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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN - 4 1996

In the Matter of	)	
	)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications	)	
Act of 1996	)	

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COMMENTS OF FRONTIERVISION OPERATING PARTNERS, L.P.

J. Christopher Redding
Michael S. Schooler

Its Attorneys

Dow, Lohnes & Albertson
A Professional Limited Liability Company
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(202) 776-2000

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COMMENTS OF FRONTIERVISION OPERATING PARTNERS, L.P.

FrontierVision Operating Partners, L.P. ("FrontierVision") hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding. Specifically, FrontierVision addresses the Commission's proposed rules clarifying the implementation of Section 301(c) of the Telecommunications Act of 1996, regarding "greater deregulation for smaller cable companies."

Section 301(c) amends Section 623 of the Communications Act of 1934 (as previously amended by the Cable Communications Policy Act of 1984 and the Cable Consumer Protection and Competition Act of 1992), by generally deregulating cable programming service tier rates for "small cable operators" in franchise areas in which such operators serve 50,000 or fewer subscribers. For purposes of this provision, a "small cable operator" is defined as

> a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

FrontierVision currently serves 215,000 subscribers -- *i.e.*, fewer than one percent of the nation's 61,700,000 subscribers. The Act does not, however, precisely define when a cable operator will be deemed to be "affiliated" with entities whose gross annual revenues exceed $250,000,000 -- and this is the issue of concern to FrontierVision. Like many small cable operators, FrontierVision, which is organized as a limited partnership, has secured financing through the sale of debt and equity (limited partnership interests) to large institutional investors whose annual revenues exceed $250,000,000. To protect their substantial investments, these investors -- including, in FrontierVision's case, J.P. Morgan & Co., Brown Brothers Harriman, Olympus Partners, and First Union Capital Partners -- often insist on an oversight role with respect to certain management decisions.

For example, the above-named institutional investors, in addition to being Limited Partners in FrontierVision, are empowered by the Partnership Agreement to serve on an Advisory Committee that has the right to review and withhold approval of certain actions of the General Partner that could affect their investment. If institutional investors that acquire such interests and rights in connection with the financing of small cable operators are treated as "affiliates" of such operators, then the fundamental purpose of deregulating small operators -- *i.e.*, to encourage investment in such operators -- will be completely thwarted.

PASSIVE INVESTMENTS AND ANCILLARY OVERSIGHT POWERS SHOULD NOT BE DEEMED AFFILIATIONS.

For purposes of Title VI of the Communications Act, the term "affiliate" is defined as "another person who owns or controls, is owned or controlled by, or is under common

ownership or control with, such person."[1] The Act does not define the attributes of ownership or control, and, therefore, the Commission has adopted "attribution rules" in implementing statutory provisions that apply to cable operators and their affiliates. In each case, the Commission has examined the underlying purpose of the statutory provision and has attempted to tailor its attribution rules to that purpose. Thus, there is no single attribution rule defining ownership and control for all purposes. The definition of an "attributable interest" varies among, for example, the cable-MMDS crossownership rule, the broadcast-cable and network-cable crossownership rules, the "program access" restrictions, and the rules adopted last year streamlining rate regulation procedures for certain small systems.

As the Commission correctly notes, Congress's purpose in deregulating CPS rates for certain small systems appears to be identical to its own purposes in streamlining small system rate regulation -- *i.e.*, to "free up resources that affected operators currently devote to complying with existing regulations and . . . enhance those operators' ability to attract capital."[2] Therefore, it proposes to adopt similar attribution rules in implementing Section 301 as it adopted last year in connection with streamlined rate relief. Under those rules, "an entity would be affiliated with a cable operator if the entity held an ownership interest of 20% or more, *either active or passive*, in the cable operator."[3]

1/ 47 U.S.C. § 522(2).

2/ *Order and Notice of Proposed Rulemaking*, CS Docket No. 96-85, ¶ 83 (released April 9, 1996), *quoting Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393, 7407 (1995) (*"Small System Order"*).

3/ *Id.* (emphasis added).

There is, however, a key difference between the new statutory provision and the Commission's small system rules. The Commission's rules provide unique regulatory relief to "small systems owned by small *cable companies*," while the statutory deregulation applies to small cable operators unaffiliated with "*any entity or entities*" with revenues in excess of $250,000,000. Thus, under the Commission's current rules, equity investments of institutional investors of any size, whether active or passive, do not affect a cable system's eligibility for small system relief. All that matters is whether the system is affiliated with a larger cable operator. But under the new statutory provision, a cable system's affiliation with *any* entities with revenues in excess of $250,000,000 will disqualify the system for deregulation.

What this means is that the Commission's "active or passive" test for equity investments, if applied to the statutory provision, would disqualify any small operators that received more than 20 percent of their equity capital from large institutional investors. This result is directly at odds with the statutory purpose of encouraging the flow of capital into small systems. Deregulating rates of small systems cannot attract investment capital if the investment of such capital will result in the *re*regulation of those systems' rates. Congress could not have intended that the passive investment in small systems by large institutional investors would disqualify those systems from deregulation.

Accordingly, the Commission should, at the outset, apply its 20% attribution standard only to *active* investment interests. But, in order to enable small operators to attract capital from institutional investors, the Commission should also make clear that institutional investors do not lose their passive status and become affiliates of cable operators merely by acquiring the limited oversight rights that are often ancillary to substantial investments. For example,

under the terms of the FrontierVision Partnership Agreement, four of FrontierVision's large institutional investors and Limited Partners are members of an Advisory Committee with certain oversight functions. While the Advisory Committee is generally empowered to "consult with and advise the General Partner [FVP GP, L.P.] with respect to the Partnership's business and overall strategy," its power to restrict the actions of the General Partner is limited to the right to veto certain specific types of actions that could directly affect the value and security of the institutional investors' investment.

This limited participation in the operation of FrontierVision's cable operations cannot reasonably be deemed to disqualify FrontierVision's small systems from deregulatory relief. First, notwithstanding any limited oversight role that institutional investors may play, their ownership interest in FrontierVision in no way enhances FrontierVision's operating efficiency or its access to *additional* capital to cover the costs of operations and growth. As the Commission has noted, regulatory relief for small systems and small operators is "aimed at those that do not have access to the financial resources, purchasing discounts, and other efficiencies of larger companies."[4] Companies with large revenue streams are "better able to absorb the costs and burdens of regulation due to their expanded administrative and technical resources."[5]

But the substantial revenues of institutional investors, which are mainly unrelated to their cable investments, do not in any way enhance the administrative and technical resources or the operating efficiencies of the cable operators in which they invest. Cable programming

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4/ *Small System Order*, *supra*, 10 FCC Rcd at 7408.

5/ *Id.* at 7409.

services and hardware suppliers do not, for example, give FrontierVision discounts on the basis of the size and revenues of its institutional lenders and investors. Nor do those investors bring to FrontierVision any operating economies of scale or scope as the result of their other investments.

Second, small system relief is generally meant to assist small companies to "obtain financing needed to grow."[6] As the Commission has noted, "[s]mall companies . . . must generate a minimum level of revenue in order to attract financing to upgrade their networks, to provide new programming to subscribers, and to introduce new services that are now being developed."[7] The fact that a small company has attracted financing from a large institutional investor in the past does not, however, enhance its ability to attract additional capital in the future. The revenues of the small operator's institutional lenders and investors are essentially irrelevant to whether anyone will lend or invest additional amounts -- except to the extent that those revenues disqualify the operator from small system regulatory relief.

Third, as a practical matter, large institutional investors will virtually always insist on the right to monitor, in one way or another, the fundamental business plans and financial investments of the cable operators in which they have invested -- or to which they have loaned -- substantial sums. Such oversight does not generally involve participation in the day-to-day operations of the company, but the financing of small companies that Congress and the Commission have sought to encourage generally comes with at least some strings attached. Deregulation and other regulatory relief for small systems simply cannot serve to attract

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6/ *Id.* at 7411.

7/ *Id.*

capital if, in order for cable systems to obtain such relief, institutional investors must forgo the oversight role that they deem essential to protect their investment.

CONCLUSION

For all these reasons, institutional investors cannot, for purposes of the implementation of Section 301(c), be deemed to be "affiliated" with cable operators simply because they have acquired, along with their equity interest, the sorts of oversight powers and rights of approval that are typically ancillary to their substantial capital investments. While purely *passive* investments obviously should not be deemed to create affiliations, the Commission must also make clear that these ancillary powers and rights do not transform the flow of capital from institutional investors into *active* -- and, therefore, affiliating -- investments. Otherwise, the objectives of Section 301(c) will be impossible to achieve.

Respectfully submitted,

FRONTIERVISION OPERATING
PARTNERS, L.P.

By: _____
J. Christopher Redding
Michael S. Schooler

Its Attorneys

DOW, LOHNES & ALBERTSON
A Professional Limited Liability Company
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036
(202) 776-2000

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CERTIFICATE OF SERVICE

I, Connie Wright-Zink, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that a copy of the foregoing "Comments of FrontierVision Operating Partners, L.P." was sent via hand delivery, this 4th day of June, 1996, to the following:

Nancy Stevenson
Cable Services Bureau
2033 M Street, NW
Room 408A
Washington, DC 20554

International Transcription Services, Inc.
2100 M Street, NW, Suite 140
Washington, DC 20037

Connie Wright-Zink